No. 15593

United States Court of Appeals
For the Ninth Circuit

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, affiliated with THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 404, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Appellants,*

vs.

CISCO CONSTRUCTION CO., an Oregon corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

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On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

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THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLANTS

For the convenience of the court the several appellants have joined in presenting a single brief.

STATEMENT OF JURISDICTION

In the spring of 1956 the appellee, Cisco Construction Company, brought an action for damages against the appellant unions in the United States District Court for the Western District of Washington, Northern Division (R. 3-10). Appellee founded this action upon Section 303 of the Labor Management Relations Act of 1947, as amended (R. 4) (App. A, *infra,* p. 79). It was

alleged that the appellant unions had engaged in a course of conduct made unlawful under the Act, and that this course of conduct caused damage to the appellee in the amount of $469,652.22 (R. 9).[1]

The case came on for trial on July 9, 1956, before the Honorable George H. Boldt, a judge of the United States District Court for the Western District of Washington, Northern Division, sitting without a jury. Following the conclusion of the trial, the court entered findings of fact and conclusions of law[2] holding that the appellee had been injured in its business and property by reason of appellants' unlawful conduct under Section 303 of the Act, and awarding appellee damages in the amount of $75,000 against the appellants anl each of them. A judgment was entered (R. 62) and this appeal followed (R. 68).

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the district court is granted by the provisions of Sections 301 and 303 of the Labor Management Relations Act,[3] 61 Stat. 136 (1947), as amended, 29 U.S.C. Secs. 185 and 187, which give the

[1] The Pre-Trial Order indicates that the appellee actually had two theories concerning the source of its cause of action (1) Section 303 of the Act and (2) common law conspiracy (R. 11). The issue of whether appellee had a cause of action for common law conspiracy, which could be brought in a federal district court, was specified as one of the "issues of law" to be determined at the trial (R. 26). However, the case was tried solely as one arising under the provisions of Section 303 of the Act, and the findings of fact and conclusions of law entered by the trial court contain no reference to the issue of common law conspiracy.

[2] Through inadvertence, the trial court's findings of fact and conclusions of law were not designated for inclusion in the printed record on this appeal. These documents are included in an appendix to this brief, Appendix B, *infra*, pp. 83 to 89.

[3] Sections 301 and 303 and other pertinent sections of the Labor Management Relations Act are reproduced in Appendix A, *infra*, pp. 79 to 81.

district courts jurisdiction of damage actions brought against labor unions, for certain conduct made unlawful under the Act, regardless of the amount in controversy or the citizenship of the parties.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this court is granted by the provisions of 29 U.S.C. Section 1291, which give the court of appeals jurisdiction of all appeals from final decisions of the district courts of the United States.

STATEMENT OF THE CASE

The Facts

1. The Cisco Construction Company—Cisco's Redmond and Young's Lake Projects

The appellee Cisco Construction Company is a corporation organized and existing under the laws of the State of Oregon with its principal place of business in Portland, Oregon, organized for the purpose of engaging in the general construction business (R. 4). At all times hereafter mentioned the president of the Cisco Company was Clifford T. Schiel (R. 81) and the vice-president was Andrew P. Cronkrite (R. 275).

During the period 1952 through 1954, Cisco was engaged in various construction jobs for public agencies in the States of Washington and Idaho (R. 83-85). Mr. Schiel testified that the company made a profit on these jobs in the neighborhood of $220,000 (R. 85). However, Cisco's income tax return for the period October 1, 1952, to July 31, 1953, showed only a net income of $3,-166.45 (Def. Ex. A) and the return for August 1, 1953, to July 31, 1954, showed a net loss of $18,288.13 (Def.

Ex. B). Mr. Schiel was unable to explain these discrepancies (R. 118).

In June, 1956, Cisco was convicted in the United States District Court for the Eastern District of Washington of the crime of filing a false claim against the government (R. 120-121, Def. Ex. C).

In 1954, Cisco was the successful bidder on certain contracts offered by the United States Army Corps of Engineers for the Construction of two "Nike" (guided missile) site projects, located in the State of Washington close to the City of Seattle.[4] One project was known as the "Redmond" job and the other as the "Young's Lake" job. Each project required the construction of a "launching area" and some distance away a "control area" (R. 85-86). Cisco's bid on the Redmond job was $409,000 and its bid on the Young's Lake job was $354,000 (R. 87-88).

Approximately 75% of the work on these jobs was sub-contracted by Cisco to various subcontractors (R. 90). The major subcontractors and their respective obligations were as follows:

Soule Steel Company—to fabricate, deliver and install reinforcing steel on both jobs (Pl. Ex. 5, 18);

Bothell Plumbing & Heating—to install all plumbing and heating and similar work on both jobs (Pl. Ex. 7, 20);

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[4] The dollar volume of materials purchased outside the State of Washington for use on the Cisco projects in 1954 and 1955 was at least $300,000 (R. 86). It is conceded by the appellants that the Cisco Company is engaged in an industry affecting commerce as those terms are defined in Section 2(7) of the Labor Management Relations Act, Appendix A., *infra*, p. 79 (R. 11).

Western Sand and Gravel—to furnish, deliver and dump concrete at Young's Lake (Pl. Ex. 8;

Cadman Sand and Gravel—to furnish, deliver and dump concrete at Redmond (Pl. Ex. 21);

Noise Control—to furnish and install insulation and acoustical material on both jobs (Pl. Ex. 9, 22);

Neuman Painting & Decorating Company—to do the priming and painting on both jobs (Pl. Ex. 10, 23);

Layrite Concrete Products—to furnish and deliver all concrete blocks on both jobs (Pl. Ex. 11, 24);

Fryer Knowles—to install floor coverings and finishing on both jobs (Pl. Ex. 13, 25);

Paduano—to do the clearing, road work and installation of culvert pipe at Young's Lake (Pl. Ex. 12);

Walker Construction—to do the clearing, roadwork and installation of culvert pipe at Redmond (Pl. Ex. 29);

Overhead Door Company—to furnish, deliver and install all overhead doors and similar lifting devices on both jobs (Pl. Ex. 14, 26);

Coast Sash and Door Company—to furnish and deliver all door frames on both jobs (Pl. Ex. 15, 27);

VanVetter Incorporated—to fabricate, furnish, deliver and install all stainless steel equipment including kitchen equipment on both jobs (Pl. Ex. 16, 28);

collective bargaining contract with the Associated General Contractors of America, covering numerous construction jobs in the area and that such contract provided for the benefits mentioned. Schiel then asked for a copy of this contract expressing an intention to discuss it with his associates in the Cisco corporation (R. 448, 449, 459, 460). Carr handed him a copy of the Carpenters' contract with the Associated General Contractors and Buchanan, after going to his car for it, gave Schiel a copy of the Laborers' contract with the Associated General Contractors (R. 449, 460). Schiel said he would take the matter up with the other members of his firm in Portland and it was agreed that another meeting would be held on the following Tuesday, October 26, at which time Schiel would give his answer (R. 449, 460).

On the 26th, Carr and Buchanan again met with Schiel. Schiel informed the two union representatives that Cisco couldn't afford to pay the fringe benefits requested. He told them that if they could persuade the Army Engineers to reimburse Cisco for paying the fringe benefits he would make such payments. Carr replied that this was not possible. Schiel indicated again that Cisco wouldn't pay and then told Carr, "You can take your men off the job if you want to. I would like to have you leave them. If they stay, they will have to work under my conditions." Schiel asked what Carr was going to do about it and Carr replied that he would have to take it up with his people. At no time did Carr or Buchanan ask Schiel to sign a contract with either of their unions. They were only interested in having

Cisco observe the union scale including travel time, overtime and health and welfare benefits (R. 449-450, 460-461).[5]

Subsequently, the Carpenters' union called a strike against the Cisco Construction Company. Carr ordered that Cisco's Redmond and Young's Lake projects be picketed and a picket line was established on October 28, 1954 (R. 450).[6] The picket sign carried by the pickets read as follows:

> "Cisco Construction Company unfair to wages and working conditions—District Council of Carpenters A.F.L." (R. 13)

When the first picket appeared, the carpenters who were members of the Carpenters Union left the job (R. 489-490). It also appears that an undetermined number of laborers left the job at the same time (R. 127).

III. The Effect of the Picket Line Upon the Subcontractors

Before the strike was called several of the subcontractors were at work on the job sites (R. 97). The calling of the strike and the creation of the picket line had an immediate effect on the work underway (R. 108).

Not only did most of Cisco's carpenters and laborers leave the job, but the subcontractors, with the exception

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[5] At the trial, Carr and Buchanan related the foregoing version of their meetings with Schiel. Schiel disputed this version, claiming that Carr and Buchanan made a demand upon him to sign a collective bargaining contract containing an illegal union security clause (R. 92-96). The trial court, however, credited the testimony of Carr and Buchanan and found that no such demand was made (R. 558-559).

[6] The picket line was created by the appellant Seattle District Council of Carpenters with the consent and approval of appellant Carpenters Union Local 131 and appellant Carpenters Union Local 1289 (R. 13-14).

of Schultz Electric Company, refused to perform any further for Cisco (R. 97). The subcontractors who were already on the construction sites pulled off and those who had yet to perform refused to do so. Either one of two things happened—in some instances the subcontractors' employees refused to cross the picket line, making it impossible for the subcontractors to perform —or, in other instances, the subcontractors voluntarily chose not to perform and made no attempt to send their men through the picket line. The evidence reveals the following with respect to the conduct of the subcontractors:

Cadman Sand and Gravel (testimony of Tor Magnussen, president):

> "We made several deliveries on the Cisco job before a picket line was established . . . (when) the picket line was established (our) driver refused to cross the picket line and returned to the plant . . . I did not attempt to send any other drivers down there." (R. 198, 207)

Neumann Painting and Decorating (Mr. Neumann's testimony):

> "We tried to (go out there to do our painting work). I took men out there, but then the men came back . . . We did endeavor to go out to the job and do our work and we discovered a picket line. My painters wouldn't cross the picket line. . . . We were not able to complete our contract because these men wouldn't go through the picket line." (R. 242, 245)

Fryer-Knowles (testimony of Mr. Bittner, manager of floor covering division):

> " . . . insofar as we are concerned, we run a union

shop and we didn't deem it advisable to send our men out to this job." (R. 211)

Acme Iron Works (testimony of Mr. Camp, supervisor):

" . . . we had refused to send our truck driver with a load out to cross the picket line at their projects . . . " (R. 261)

Soule Steel (testimony of Mr. Anderson, office manager):

"Our men reported for work there on the morning when the picket line was on, and they did not go to work . . . When the picket line was put on, the men pulled themselves from the job." (R. 262-263)

Western Sand and Gravel (testimony of Mr. Smith, president):

"I will not tell my men to cross the picket line." (R. 303)

Layrite Concrete (testimony of Mr. Frese, president):

"(When the picket line was established) one of our salesmen told Cisco that we would not like to force our drivers to go through the picket line at the job site . . . our salesmen came back with verbal permission to alter our contract to where Cisco would pick up the material." (R. 240)

Walker Construction and Bothell Plumbing and Heating (testimony of Louis S. Smith, Cisco's assistant superintendent):

"As I remember, Walker's crew pulled out of there completely when the strike situation developed . . . The owner of Bothell Heating and Plumbing, Mr. Del Taylor, came back there and directed work by another crew. His crew never came back on the job." (R. 493)

IV. Subsequent Activities of Appellant Unions Involving the Subcontractors

After the job site picket lines were established several incidents occurred involving one or more of appellant unions and various Cisco subcontractors.

A. *Cadman Sand and Gravel*

Under the terms of its subcontract, the Cadman Sand and Gravel Company was obligated to furnish and deliver concrete to Cisco's Redmond project (Pl. Ex. 21). Prior to the creation of the job site picket lines, several deliveries were made (R. 198). However, on November 5, 1954, a Cadman employee was sent to make a delivery. When he observed the job site picket line he refused to cross and returned to the plant (R. 97, 198, 207). Two days previously, Schiel made arrangements to lease some trucks from the Western Sand and Gravel Company in anticipation of Cadman's failure to deliver the concrete. When the Cadman driver refused to go through the picket line, Schiel requisitioned the leased trucks and, with his own drivers, undertook to pick up the concrete at Cadman's plant. Two of these trucks were loaded with concrete and made a delivery to the construction site (R. 99, 133, 199).

When Carr found out that Cisco was using leased trucks to haul concrete from Cadman's to the job site, he called the union's attorney and then decided to put on a roving picket line (R. 412). Carr proceeded to the Cadman plant where he found a Cisco truck underneath the hopper waiting for a load of concrete, and thereupon he created a picket line (R. 422). The pick-

ets wore the same banner as was used on the job site (R. 200). These pickets subsequently appeared at Cadman's on occasions when Cisco trucks arrived there to be loaded (R. 13, 201).

After creating the picket line, Carr went up into the hopper (*i.e.,* the place from where the trucks are loaded, also known as the batching plant) and spoke to a Mr. Forcier, the employee working there. Forcier was a former member of the Teamsters Union and had made application for membership in appellant Operating Engineers Local 302 (R. 156). Carr told him that the Carpenters had a roving picket line on the Cisco Company. Not knowing what to do, Forcier placed a call to Mr. Russell Conlon, secretary of appellant Operating Engineers Local 302. Conlon was out of the office at the time but after a short delay, Conlon called back (R. 157). Forcier asked Conlon what he should do about loading Cisco trucks, and Conlon replied it was up to him (R. 158). After this phone call Forcier spoke to his employer, Mr. Magnussen, telling Magnussen that he got the impression that his Union did not want him to load Cisco trucks (R. 163). Magnussen then called Conlon and Conlon repeated that it was up to the man's conscience. Magnussen then explained to Forcier that Conlon was not ordering him to stop work and directed him to finish his work (R. 163, 201). Forcier returned to the batching plant and loaded the Cisco trucks (R. 158, 162).

Later in the day Mr. Crowder, a business agent of appellant Teamsters Union Local 174, called Mr. Magnussen. Crowder told Magnussen that Forcier was not

a member in good standing of the Operating Engineers and that the Engineers were coming out the next day to tell him not to load Cisco trucks (R. 12, 201). Crowder then talked to Forcier telling him that the conversation was being tape recorded and suggesting to him that he should go home and threatening him with the loss of his Teamster withdrawal card (R. 160). Forcier replied that he would take his instructions from the Engineers Union, and not from the Teamsters (R. 164). Later that same evening Mr. Crowder and Mr. McDonald and Mr. Abbott of the appellant Operating Engineers Union Local 302 spoke to Mr. Magnussen at his plant. Magnussen asked what could be done to straighten the matter out so that Cadman could deliver concrete to the job site with its own employees, but the union representatives gave no answer (R. 203).

Although there was a delay of an hour and a half, at the most, on November 5 during the period that Forcier was determining what to do (R. 102, 133, 165) the waiting Cisco trucks were loaded (R. 103, 158, 162) and there was no further delay in loading, either on this day or on any of the subsequent days on which the roving picket line appeared at the Cadman plant (R. 162, 201). Schiel testified on direct examination that the delay on November 5, 1954, might have easily developed into a serious situation, if the concrete already poured had set while they were waiting for another load (R. 101-102). On cross-examination he indicated that some difficulty had actually resulted from the delay, necessitating the expenditure of "thousands of dollars" for repairs on certain concrete foundations (R. 144).

On or about November 8, 1954, three employees of Cadman (Downs, Cotterill and Pearson, members of appellant Operating Engineers, Local 302) were approached by "Jiggs" Abbott, a business agent employed by the Local. Each of these employees testified that Abbott requested them to come across the road and talk to him the next time the roving picket appeared (R. 187, 192, 195). However, none of these men interpreted this request as being a demand that they leave the job (R. 190, 193, 197), and when the picket subsequently appeared, none of the men bothered to "cross the road."

Downs testified:

> "They showed up the next day, but I did not leave my job." (R. 187)

Cotterill testified:

> "I did not go to see Abbott (when the pickets arrived) . . . I performed all my normal duties on the day that the pickets first showed up (and) on subsequent days." (R. 193)

Pearson testified:

> "The pickets came some time after this conversation. I do not know what the picket banner said. I never paid no attention to it . . . I performed my normal duties the first day the pickets showed up. There was no day when the pickets were there that I didn't perform my normal duties. There was no day when the pickets were there that I observed any other of the employees who did not perform their normal duties." (R. 195, 196)

A further incident involving Cadman Sand and Gravel and its employees occurred on November 11, 1954. When Cisco made arrangements to pick up the

of Cadman immediately returned to work and continued to work thereafter. In the words of Mr. Magnussen, president of the Cadman Company, "all of the employees performed all of their normal work after that meeting" (R. 210) or, as one of the employees put it, "the men were in favor of sticking with the company and continuing to work. They did continue to work. There was no work stoppage at the Cadman plant" (R. 190). Schiel, who eavesdropped on the meeting, admitted that the employees returned promptly to work at the normal time after the meeting (R. 153) and that there was little delay, if any, in the loading of Cisco trucks (R. 140).

All of the foregoing incidents had no substantial effect on the work performance of the Cadman employees. There was a delay of not more than an hour and a half on November 5 during the time some phone calls were made (R. 102, 143). However, the waiting trucks were loaded (R. 103, 161-162), and on all other occasions Cadman furnished concrete to Cisco without delay or interruption (R. 201). Cisco got all the concrete that it wanted or that was called for by the terms of the subcontract (R. 206). Cisco incurred added expense because it had to haul this concrete itself, but this expense was charged back to Cadman under the terms of the subcontract (R. 133, 206).

B. ***Layrite Concrete Products***

The Layrite Company was obliged by the terms of its subcontract to furnish concrete blocks and deliver them to the job site (Pl. Ex. 11). When the job site picket line was created, however, the Layrite manage-

ment decided not to require its employees to go through the picket line. A Layrite salesman so informed Cisco and the two companies reached an agreement by which Cisco, using its own trucks and employees, would pick up the concrete blocks at the Layrite plant (R. 240). Subsequently the following incidents occurred.

On or about November 29, 1954, and on two subsequent occasions, three employees of the Layrite Company (James Thurman, William Quinnett and William Larkin, all of whom were members of appellant Laborers Union Local 440) were engaged in conversation by Ed Lucero, an assistant business agent of Local 440. Lucero told them that the Cisco Company was involved in labor difficulty and asked them not to load Cisco trucks, threatening them with union disciplinary proceedings if they refused (R. 214-217, 222-223). The men promised to do as requested but Mr. Baumgartner, a company officer, told them that Layrite had a contract with Cisco to furnish material and if they refused to load the trucks they would be fired (R. 219, 224). The men chose to continue working and there was no work stoppage or refusal to load Cisco trucks (R. 219, 224). Thurman testified as follows:

> "Q. And Mr. Thurman, did you continue to load the trucks?
>
> A. Yes, sir.
>
> Q. And at all times.
>
> A. Yes, sir.
>
> Q. Was there any, from the time Mr. Lucero talked to you about 5 o'clock on the evening of November 29, 1954, was there any delay in the loading of Cisco trucks?
>
> A. Not that I know of, sir." (R. 218)

Quinnett testified:

"Q. Was there any work stoppage as far as the loading of Cisco trucks was concerned?

A. No, sir." (R. 224)

On November 29, 1954, Vern Frese, president of Layrite, received a call from Jack MacDonald, secretary of appellant Operating Engineers Local 302 (R. 228). Most of Layrite's employees were covered by a collective bargaining contract between Layrite and Laborers Union Local 440 and were members of Local 440, but there was one supervisory employee, who operated a bulldozer part time, who was a member of the Operating Engineers (R. 237). Frese testified that MacDonald asked whether Layrite was going to continue loading Cisco trucks and Frese replied that they were. MacDonald then suggested that they find some excuse for not performing and then threatened Frese with the possibility of the Union taking disciplinary action against his men or against the company directly (R. 228-229). Frese admitted that the general conversation was quite heated and because he knew that any disciplinary action against his employees would involve Laborers Local 440 and not Engineers Local 302, he interpreted MacDonald's threats as being pretty much of a bluff (R. 327-238). In any event, Frese did not alter his position that he intended to continue to supply Cisco with concrete blocks and no action was ever taken by appellant Operating Engineers Local 302 against Layrite or any of its employees (R. 239).

On that same day, November 29, Mr. Frese also learned of Lucero's visit to the plant and his threats to the employees. He therefore telephoned Lucero's supe-

rior, Mr. James V. Sauro, secretary-treasurer of appellant Laborers Local 440 (R. 229, 233). Frese told Sauro about Lucero's activities among his employees and inquired as to the official policy of the union. Frese claimed that Sauro indicated that he would investigate the situation (R. 229, 233). Sauro's version of the conversation is that he immediately repudiated Lucero's conduct and explained that there was to be no work stoppage involving Layrite employees. On November 30 another conversation was had between these two men. At this time, Sauro said there was to be no work stoppage (R. 231, 232, 480).

On December 7, 1954, Sauro sent Lucero to the Layrite plant to explain the Union's position (R. 481-482). At that time Lucero informed the Layrite management and its employees that the Union did not want any work stoppage and there was to be no interruption in the loading of Cisco trucks. He retracted his previous statements to the contrary (R. 219, 220, 225, 235).

There was no interruption of work schedules at the Layrite plant. Mr. Schiel, president of Cisco, testified that at some time in early December there was a delay of an hour or so in the loading of one of his trucks at the Layrite plant and that there were other delays (R. 112, 150-151). Mr. Schiel made no explanation of why such delays occurred nor could he recall the date when they occurred (R. 151). Mr. Frese, president of Layrite, could not recall any such delays:

> "Q. And was there any work stoppage as far as loading of those trucks is concerned?
>
> A. Not to my knowledge.
>
> Q. Well, now, Mr. Frese, if there had been any

delay in loading of the Cisco trucks, would you have known about it?

A. I am sure that I would have. Now, it depends on what you mean by 'delay.' Sometimes a driver will come in with a truck and go up to the office for a ticket, and the truck may sit there for a few minutes while he is getting his invoice and orders straight, but I would say there was no delay other than the normal loading operation." (R. 234)

Layrite continued to furnish concrete blocks to Cisco over a period extending several months beyond any of the aforesaid incidents (R. 236). Adjustments were made in Layrite's subcontract price because of the added expense to Cisco in having to pick up the concrete blocks at Layrite (R. 136).

C. *Western Sand and Gravel Company*

The Western Sand and Gravel Company had a subcontract with Cisco to furnish and deliver concrete to Cisco's Young's Lake project (Pl. Ex. 8). When the job site picket line appeared at Young's Lake, the president of Western Sand and Gravel, Mr. Paul H. Smith, decided that he would not tell his truck driver to cross the picket line (R. 303). Thereafter, either Mr. Smith or his partner Mr. Charles Pauchek would drive the trucks and deliver the concrete (R. 303-309). On some occasions Western's truck driver, Mr. Lawrence Ward, would drive a truck as far as the picket line and then Smith or his partner would drive it across and make the delivery (R. 303). In addition to the furnishing and delivery of the concrete under the terms of the subcontract, Western entered into a supplemental con-

tract with Cisco by which it agreed to furnish some road gravel and other material (R. 307). These materials Cisco picked up at the Western plant in its own trucks and with its own employees (R. 304, 308).

Early in November, 1954, Mr. Smith made arrangements to lease some of Western's trucks to Cisco so that Cisco could pick up concrete for the Redmond job at the Cadman Sand and Gravel Company. About this time Smith received a call from Al Crowder, business agent of appellant Teamsters Local 174. Crowder advised Smith not to lease the trucks to Cisco, but he added that it was Western's legal right to do so (R. 300-301). This did not deter Smith from going through with the lease arrangement, however, and, as a result, Cisco used Western's trucks for several days (R. 301).

On or about November 14, 1954, Smith and his partner Charles Pauchek were the recipients of a visit by a Mr. Washam, a representative of the Teamsters Union Local 910 in Kent, Washington (Local 910 is not a party to this law suit). Western at this time was a party to a collective bargaining agreement with Local 910. Washam asked if Western wouldn't refuse to deliver material to the Cisco job. Both the men replied that they had a contract and intended to perform (R. 251, 301). Washam also talked to the truck driver, Lawrence Ward. Washam reportedly told Ward that he was not to go on any job involving the pouring of concrete for Cisco (R. 248).

Two or three days later, on or about November 16, 1954, Washam paid another visit to the Western plant, this time accompanied by two unidentified gentlemen

(R. 251-252, 301-302). Smith believes these gentlemen represented respectively the Carpenters and Engineers Unions, but neither he nor Pauchek could recall their names or the exact unions or locals with which they were connected (R. 253, 302). These men asked again that Western not deliver materials to the Cisco job site and suggested that perhaps loopholes could be found in Western's subcontract by which this could be done. Smith replied that had they made the request before he signed the subcontract there might have been a different story but now his hands were tied and he had to perform (R. 251-252, 302).

On the morning following the meeting with the three men, Smith had another visit from Washam. Washam asked again if Smith would stop delivering materials and Smith reiterated his prior statement that he could not stop. Washam then said that they would do everything they could to stop him (R. 302-303).

All of the foregoing testimony, concerning a Mr. Washam of Teamsters Local 910 in Kent, Washington, was admitted into evidence over the objection of the appellants (R. 247, 249, 250, 253). The trial court announced that the evidence would be admitted and that the objection would be reconsidered later in the case (R. 247, 249, 250, 251, 253). At the conclusion of the trial the appellants renewed their motion to strike all testimony relating to the activities of Mr. Washam (R. 557), but the trial court made no ruling on the motion.

On November 15 or thereabouts a picket appeared in front of the Western plant for about one and a half to two hours (R. 14, 248, 303, 309). This picket dis-

played a sign reading "Cisco Unfair to Organized Labor." Smith believes it was the same sign as that used by the Carpenters Union at the Cisco job. Smith does not recall that there were any Cisco trucks or other equipment or Cisco personnel present when the picket was there (R. 303).[8] The picket appeared during the noon hour and was observed by Lawrence Ward, Western's truckdriver. When Ward returned from lunch, the picket was gone (R. 248). The picketing had no effect on the performance of work at the Western plant. Ward testified:

> "There was no work stoppage during the time that this picket was present. . . None of the employees refused to perform their normal work as a result of the picket being there. I don't know of any other effect this picket had on the work that was performed by the employees." (R. 249-250)

and Mr. Pauchek testified:

> "Q. Did the picketing have any effect upon the normal performance of the duties of your employees?
>
> A. No, they never." (R. 253)

The efforts of Mr. Washam of Teamsters Local 910, Kent, Washington, and other unidentified union officials to persuade Western's management to ignore their subcontract with Cisco were to no avail. Smith and Pauchek remained steadfast in their determination to perform and they did so even though, occasionally, they had to make deliveries themselves (R. 134, 303, 309).

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[8] However, it was stipulated in the Pre-Trial Order that Cisco's trucks *were* present when the picketing occurred (R. 14).

There was no work stoppage at the Western plant. Smith testified:

> "Q. As a result of (the conversation with union officials) did any of your employees stop working?
>
> A. There was no work stoppage.
>
> Q. Was the normal operation of your business interfered with as a result of this conversation?
>
> A. No, sir." (R. 310)

A portion of the added expense to Cisco in having to use its own equipment and employees to obtain material from Western, was charged back to Western under its subcontract (R. 133).

D. ***Soule Steel Company***

Under the terms of its contract with Cisco, Soule Steel was to deliver, furnish and install structural steel on both job projects (Pl. Ex. 5, 18). Soule Steel had started delivery on the Redmond project at the time the picket line appeared. On the morning when the picket line was created, however, the employees of Soule Steel reported for work, but would not cross the picket line. Subsequently, the Cisco company arranged to pick up the steel from the premises of the Soule Steel Company using its own truck (R. 262-263). Thereafter an unidentified Union agent called on Mr. Vern Anderson, district manager for Soule Steel. This person made some comment to Anderson about the picket line at the Cisco job and then asked him what would happen if there was a picket line around his plant. Anderson replied that they had a contract with Cisco and that they intended to live up to the contract as best they could (R. 263).

At the conclusion of the trial the appellants moved to

strike the foregoing testimony relating to the unidentified union representative (R. 557) but the trial court made no specific ruling on the motion.

Work at the Soule Steel Plant was not interrupted in any way by Anderson's conversation with the unidentified union agent or by any other union activities. Employees of Soule Steel did not cease work, nor did they refuse to load Cisco trucks. Anderson testified:

> "Q. Now, was there any interruption in loading Cisco trucks experienced later on when your men refused to pass the picket line.
>
> A. In loading their trucks?
>
> Q. Yes.
>
> A. No." (R. 264)

The increased costs to Cisco resulting from Cisco's having to pick up the steel at the Soule Steel premises were absorbed by Soule Steel. Soule Steel issued Cisco a credit under the terms of the subcontract for Cisco's additional expense in picking up the material itself (R. 136, 265).

E. *Acme Iron Works*

The Acme Iron Works was to furnish and deliver miscellaneous metal work for the Cisco project at Young's Lake (Pl. Ex. 6). When the picket line appeared, the management of Acme Iron Company refused to send their truck driver across the picket line. It was agreed at that time between Cisco and Acme Iron that Cisco would send in a truck and pick up the material at Acme's facilities (R. 261).

Some time in early November, 1954, a Cisco truck was being loaded at the Acme Iron Company. An em-

ployee by the name of Dell Earl Peeler was supervising the loading (R. 256). Two men came up to Peeler, one of them identifying himself as being from the Teamsters Union and the other from the Operating Engineers, and they made reference to the Cisco Construction Company and the fact that it was being picketed. They suggested to Peeler that it would help their cause if Acme refused to load the Cisco trucks (R. 257). Peeler could not identify the men, nor the locals they represented (R. 258-259). On this same occasion Mr. Luther Camp, an official of Acme Iron Works, talked to these two men (R. 260). They informed Camp that Cisco was non-union and hiring non-union help and asked if Acme would cooperate by not loading their trucks. While on the premises, these men also entered Acme's fabricating shop and apparently talked to employees there (R. 259). Camp had no recollection of the men's names or of what union they represented (R. 260).

At the conclusion of the trial the appellants moved to strike the foregoing testimony relating to the unidentified union representatives (R. 557), but the trial court made no specific ruling on the motion.

The plea of these two unidentified union officials that the employees of Acme cease loading Cisco's trucks had no effect whatsoever. The Acme employees continued to load the Cisco trucks as they had done before. Peeler testified:

> "Q. The loading went on, however, did it not?
> A. Yes.
> Q. There was no interruption in the loading?
> A. The loading went on." (R. 259)

F. ***Neumann Painting & Decorating***

Neumann's subcontract with Cisco required it to perform the priming and painting work on both projects (Exs. 10, 23). When the job site picket lines were created, Neumann's employees refused to cross, and Neumann was unable to perform (R. 242).

Subsequently, Mr. Willy Neumann, president of the painting and decorating company and himself a member of Painters Union, Local 300 (not a party to this litigation) attended a meeting at the Seattle Labor Council, at the request of the Painters Union (R. 242). Neumann could not recall the exact date of the meeting, and he did not think there were any of the other Cisco subcontractors present (R. 242). The only person he identified was the business representative of the Painters Union, although he thought there were representatives of other unions in attendance (R. 243). There was a brief discussion of the Cisco situation at this meeting. In Neumann's own words:

> "There was not much said (about the Cisco job). They just told us we can't go ahead with this job, and then I tried to tell them that we would like to subcontract it to a non-union painting contractor, and they said no." (R. 243)

G. ***Bothell Plumbing and Heating and Walker Construction***

Carr testified that he did not remember any such meeting as that described by Neumann (R. 270). He did recall, however, that Mr. Taylor of the Bothell Plumbing and Heating Co., and Mr. Walker of Walker Construction Co. requested a meeting with the unions

to discuss the Cisco situation (R. 271). Representatives of the Plumbers Union (not a party to this litigation), and the appellant Engineers, Local 302, were present (R. 273). Taylor and Walker requested permission from the unions to work behind the job site picket line with non-union people. They were told that such a matter was entirely up to them (R. 273). No threats were made (R. 274).

Conlon, secretary of appellant Operating Engineers Local 302, attended this meeting and he recalls that Walker and Taylor wanted the Unions to specifically instruct their members to go through the job site picket lines (R. 478-479).

Although his employees would not cross the job site picket lines, Taylor substantially performed his subcontract by supervising Cisco employees in performing the work originally required in the subcontract (R. 493, 556).

H. *Settlement Negotiations*

Mr. Cronkrite, Cisco's vice-president, testified that some time in March or April[9] he attended a meeting in the office of Mr. Bassett, the attorney representing several of appellant unions, for the purpose of discussing a "compromise" with the unions. Several union representatives were present, including Mr. Carr of the appellant Seattle District Council of Carpenters and Mr. Lucero of the appellant Laborers Union Local 440. Also present were representatives from the Painters, Electrical Workers and the Teamsters (R. 287). Dur-

[9] He did not specify the year. Apparently it was 1955.

ing the course of this meeting Mr. Carr said that he couldn't permit his union men to work on the same job with non-union men (R. 290). This statement was repeated the next day by Mr. Carr or another union representative when a group of union men visited the job site (R. 290).

Cronkrite also testified that on a subsequent date he had a telephone conversation with Mr. Bassett or Mr. Vance (R. 291) in which he was told that the way to get the subcontractors "restored" was to employ all future men needed on the projects through the union and to get rid of the non-union men (R. 292).

Cronkrite admitted, however, that in the conference in Mr. Bassett's office, the Carpenters Union was willing to make a settlement, which included the payment of travel time and health and welfare benefits, but the Carpenters and Cisco could not agree on the date such benefits should be effective (R. 296).

V. Completion of the Projects—Cisco's Damages

Cisco claimed that the union picketing caused the subcontractors not to perform and created financial difficulty for the company. In the words of Mr. Schiel, president of Cisco:

> "The picketing produced a most serious and difficult financial problem. Failure of our subcontractors to perform required us to assume and take over the performance of their work, as we had a prime contract with the government and a time schedule to meet with penalty clauses in the contract if we failed to complete the job on time. So we had to perform and take over the additional overhead expenses and procurement of labor, ma-

terials and equipment, as well as supervision, and the installation and performance of their entire subcontracts." (R. 115)

One of the major expenses said to have taxed the financial resources of the company was the increased payroll it had to meet when it took over the work of the subcontractors (R. 115).

Within a few months after the picketing began, Cisco's financial condition became so involved that the United States Fidelity and Guaranty Company, which had issued performance bonds insuring Cisco's completion of the projects was required to assume administrative and financial control (R. 115, 167, 168). The bonding company assumed control on February 1, 1955 (R. 155, 284, 285) and under its supervision, the projects were finally completed late in 1955, and accepted by the Corps of Engineers (R. 13, 505-506). Although the projects were completed several months behind schedule, no penalties were assessed by the government (R. 508).

Cisco attributed all of its financial difficulty to the alleged unlawful conduct of appellant unions. It sought to recover damages for (1) the additional expenses it incurred on the Young's Lake and Redmond projects, (2) its loss of profits on other jobs, and (3) the complete destruction of its business (R. 18). However, there was testimony indicating that other matters in addition to the "labor difficulty" contributed to the delay in completing the projects and increased Cisco's costs and expenses. There was testimony indicating that a major subterranean water problem developed

at the Redmond site causing considerable expense and delay. After the construction work had begun and several excavations completed, it was discovered that there existed a subterranean water problem (R. 490). The water was greatly in excess of what anyone had anticipated (R. 491). The excess underground water and the poor type of soil on the project produced a type of quicksand and made quagmires of the excavations. As Schiel explained:

> "... the material was such that if a man walked out into it, why he became quickly mired and had to be either rescued or fight his way out, if he could, and no equipment could operate in the holes." (R. 111)

It was estimated that the subterranean water problem, if it had existed apart from the other difficulties, would have delayed the completion of the Redmond project approximately 90 days (R. 111, 293).

There was other testimony to the effect that the type of construction undertaken was a new experience for Cisco and that other contractors working on the same type of project had also experienced delay (R. 507, 508). There was also testimony indicating that Cisco attempted to perform with inexperienced foremen, superintendents and personnel and that it used inadequate equipment and materials (R. 486, 489, 496, 503, 505, 509, 510).

Cisco's major emphasis in proving damages was in stressing the additional expenses it incurred on the two projects over and above the expenses contemplated in the original contract bids. Although the general practice in the construction industry is to maintain job cost

records (R. 383, 384, 553, 554, 512), Cisco kept no such records (R. 127, 341, 342, 376). The expenses incurred on the various projects undertaken by the company, as well as income received, were commingled in a general ledger (R. 342). Thus, Cisco was unable to present from its own records any precise accounting of the expenses it incurred on the Redmond and Young's Lake projects beyond those originally contemplated in the bids submitted to the government. However, working from the records of the bonding company, Cisco's accountant prepared a "Job Cost Summary—Young's Lake and Redmond Contracts" (R. 349, Pl. Exhibit 41). This document purported to be a breakdown of the expenditures incurred on the two projects beyond those contemplated in the original bids (R. 357). It indicated that Cisco incurred an additional expense on the Young's Lake project of $214,264.35 and on the Redmond project of $48,420.26 (Pl. Ex. 41).

Exhibit 41 was based, in part, on material taken from appellee's Exhibit 40. Both these exhibits, together with another exhibit, were offered in evidence at the same time (R. 348-349). Appellants objected to the admission of Exhibit 40, on the grounds that its authenticity hadn't been established, that it was prepared by someone other than the witness who explained it, that the person who prepared the document was not called to testify, and that it was not the best evidence (R. 350-352). Appellants made the same objection to Exhibit 41, as it was based on Exhibit 40 (R. 351). The trial court, while admitting that it was "in doubt" as to the ruling, overruled the objections and admitted Exhibit 41 (R. 352-353).

Upon cross-examination Cisco's accountant admitted that there were several inaccuracies and omissions in Exhibit 41 (R. 396, 399-402, 435-437, 440). He was unable to give any explanation for some of the items listed (R. 435, 436).

At the conclusion of the trial the trial court ruled that the initial job site picketing was legal, but also indicated that *thereafter* the appellants or some of them may have engaged in activities proscribed by Taft-Hartley Act (R. 31). The court was in doubt, however, on the proper construction of the Taft-Hartley Act, and the cases interpreting it (R. 29); and it suggested to the appellee that it wished to have a memorandum submitted:

> (1) "pointing out what direct evidence there is in the record of actions by the defendants amounting to encouragement, inducement, procurement, by concerted action that looked towards termination of the subcontracts, and then point out what plaintiff suggests are the reasonable inferences that might be drawn from the direct evidence." and
>
> (2) "lastly, in the memorandum I wish the plaintiff to suggest what the evidence warrants in the way of a damage award for the first item of damage only; namely, what does the evidence show the damage was with respect to increased cost of performance flowing from and caused by termination of the subcontracts." (R. 31)

In response to this request, appellee submitted a lengthy memorandum (R. 32-55). On the issue of liability, appellee's main emphasis was on the fact that the National Labor Relations Board, in unfair labor

practice proceedings, had found appellants in violation of Section 8(b)(4) of the Act, and had ordered them to cease and desist from such activities (R. 34-38). Appellee also argued that the job site picket line, even though found by the trial court to be legal, was so enmeshed with other unlawful activities of appellants as to become illegal (R. 33-34).

On the issue of damages, therefore, appellee repeated its position that the appellants were responsible for *all* the additional expenses incurred by Cisco because of the non-performance of the subcontractors on both projects. Appellee did not segregate the expenses incurred as a result of the job site picket line, from those resulting, if any, from the other activities of the defendants. Appellee submitted two revisions of Exhibit 41. It explained that these revisions were prepared after the trial, because of the number of errors in the exhibit as originally submitted (R. 46-48). One of these revised exhibits indicated that Cisco sustained additional costs of $180,981.47 in completing the two projects (R. 51), and the other revised exhibit indicated that the additional costs were some $193,064.47 (R. 52).

The trial court made no special findings of fact on the issue of damages. It simply held: "That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, the plaintiff was required to provide in whole or in part

the services and materials defaulted under the subcontracts, and was put to an expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00.

SPECIFICATION OF ERRORS

1. The findings of fact are not supported by the evidence.

2. The conclusions of law are not supported by the findings of fact and the evidence.

3. The judgment is not supported by the evidence and/or the findings of fact.

4. The court committed error in the admission and rejection of evidence and in refusing to strike certain admitted evidence.

4. (1) The court erred in admitting testimony and in refusing to strike testimony that in November of 1954 a business agent of Teamsters Union Local 910 instructed an employee of the Western Sand and Gravel Company not to go on the Cisco job (R. 247-248), and suggested to the owner of the Western Company that they not perform for Cisco (R. 250-252).

Appellants objected that this evidence was inadmissible on the ground that Teamsters Union Local 910 was not a defendant in the case (R. 247, 249, 250, 251, 252-253).

The trial court admitted the evidence indicating it would reconsider a motion to strike later in the case (R. 249, 251, 253). At the end of the trial the appellants renewed the motion to strike (R. 557) but the court made no ruling on the matter.

4. (2) The trial court erred in refusing to strike testimony that two unidentified union representatives, purporting to be from the Teamsters and Engineers Union suggested to employees of the Acme Iron Works that it would help their cause if Acme employees refused to load Cisco trucks (R. 257-259, 260-261).

At the conclusion of the trial the appellants moved to strike this testimony on the ground that it related to "unidentified" persons (R. 557) but the trial court made no ruling on the motion.

4. (3) The trial court erred in refusing to strike testimony that an unidentified union agent threatened the manager of the Soule Steel Company with creating a picket line at his plant if Soule continued to furnish Cisco with materials (R. 263).

At the conclusion of the trial the appellants moved to strike this testimony on the ground that it related to an "unidentified" person (R. 557), but the trial court made no ruling on the motion.

4. (4) The trial court erred in admitting into evidence appellee's exhibits No. 38, 40 and 41. Exhibits 38 and 41 were prepared, in part, from Exhibit 40. Exhibit 40 was prepared by a person who did not testify, from records of the bonding company not in evidence.

Appellants objected on the ground that the exhibits were incompetent; that their authenticity hadn't been established; that the parties who prepared the original records and entries weren't called to testify and that it was not the best evidence (R. 351-352). The trial court admitted the exhibits under the "shop book" rule but indicated he was in doubt as to his ruling (R. 353).

5. The court erred in denying the following motions of the defendants:

a. For dismissal at the close of the plaintiff's case.

b. For dismissal at the close of all evidence.

c. For judgment notwithstanding the oral decision of the court.

d. For a new trial.

6. That the court erred in entering judgment on behalf of the plaintiff and in failing and refusing to enter judgment on behalf of the defendants.

SUMMARY OF ARGUMENT

Appellants submit that the findings of fact entered by the trial court are vague and indefinite and fail to reveal the "factual basis" for the decision below. These findings are insufficient under Rule 52(a) of the Federal Rules of Civil Procedure. Appellants urge that this case be remanded to the trial court for the entry of specific and forthright findings of fact on the material issues.

In the alternative, in the event that this court determines to make a review of all the evidence, appellants submit that the evidence in the record fails to support the judgment below. To sustain a recovery under Section 303 of the Labor Management Relations Act appellee has the obligation of making a showing, with competent evidence, that it sustained actual damages as a result of "secondary boycott" activities on the part of the appellants.

Pursuant to an economic dispute with the appellee, the appellant Seattle District Council of Carpenters

created and maintained picket lines on the premises of the appellee. This conduct constitutes lawful "primary" activity and cannot form the basis for an award of damages under Section 303. Any damages flowing from the job site picket lines are *damnum absque injuria.*

Subsequently, there were several incidents involving the employees of the appellee's subcontractors, and the appellants. Even assuming that these incidents constituted unlawful "secondary" activities under Section 303, there is no showing that the appellee was damaged thereby. None of the employees of the subcontractors ceased working. There is a complete failure of proof on the issue of whether appellee was damaged by any "secondary" activities on the part of the appellants.

ARGUMENT

I.

THE FINDINGS OF THE TRIAL COURT ARE VAGUE AND INDEFINITE AND DO NOT REVEAL THE FACTUAL BASIS FOR THE DECISION BELOW

(Specification of Error No. 1)

Appellants recognize that they have the burden, in an appeal of this type, of pointing out specifically wherein the findings of the trial court are clearly erroneous. *Glen Falls Indemnity Co. v. United States,* 229 F.2d 370 (9th Cir. 1955). It is difficult for appellants to make such a showing in the instant case, however, as the findings entered by the trial court are vague and indefinite and do not reveal the "factual basis" for the decision

reached. It is impossible to determine from the findings what "facts" were actually found.

Appellants submit that the findings of fact entered by the trial court[11] are insufficient under the requirements of Rule 52 of the Federal Rules of Civil Procedure and that this Court should remand this case to the court below for the entry of definite and forthright findings of fact on the material issues.

A. Rule 52 of the Federal Rules of Civil Procedure Requires Explicit Findings of Fact on the Material Issues

Rule 52(a) of the Federal Rules of Civil Procedure provides, in part:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . Findings of fact shall not be set aside unless clearly erroneous . . . "

Findings of fact are required in order to give the appellate court a clear understanding of the basis of the trial court's decision. That is the major purpose sought to be achieved by the rule.[10] See Barron & Holtzoff, Federal Practice and Procedure, Section 1121 and cases cited therein.

Findings of fact must be as explicit as possible. In the recent case of *Irish v. United States,* 225 F.2d 3

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[11] As is the usual practice the findings in the instant case were prepared by counsel for the prevailing party (the appellee).

[10] The Court of Appeals for the Second Circuit has pointed out that findings of fact not only enable the appellate courts to more conveniently review decisions of trial courts but they also serve the important purpose of evoking care on the part of the trial judges in ascertaining the facts. *United States v. Forness,* 125 F.(2d) 928, 942 (2nd Cir. 1942).

(9th Cir. 1955), this Court had before it a case arising under the Federal Tort Claims Act, in which the trial court had failed to make specific findings on the issue of negligence. The findings did not reveal which witnesses the trial court believed or which facts were accepted as true. This Court remanded the case to the trial court for the entry of appropriate findings, holding:

> "Findings of fact are required under Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A. The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision (citing cases).
>
> "The findings in this case provide no such understanding and give no hint as to the factual basis for the ultimate conclusion."

Without appropriate findings of fact it becomes necessary for the appellate court to review the entire record to determine the evidentiary facts. The finding of evidentiary facts, which involves credibility determinations and the weighing of the evidence, is regarded as an appropriate duty of the trial court.

> "It is well settled that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion." (Citing cases)
>
> * * * * * * * *
>
> "Without such finding it is impossible for us to review intelligently the decision of the trial court. We could, of course, retry the case ourselves and wade through hundreds of pages of testimony and exhibits for the purpose of finding initially the basic and evidentiary facts; but this is a function

which can be better performed by the trial court which has had the advantage of seeing and hearing the witnesses." *Timmons v. Commissioner,* 198 F. 2d 142 at page 143 (4th Cir. 1952).

See also *Maher v. Hendrickson,* 188 F.2d 700, 702 (7th Cir. 1951); *Kweskin v. Finkelstein,* 223 F.2d 677, 678-679 (7th Cir. 1955).

B. The Trial Court Findings Are Vague and Indefinite

In the instant case the findings of fact entered by the trial court (App. B, *infra,* pp. 83-89) are vague and indefinite in the following respects.

1. *Finding of Fact No. II*

Neither Finding of Fact No. II, purporting to identify the defendants in the case, nor any of the other findings, makes any reference to appellant Carpenters Union Local 131 or to appellant Carpenters Union Local 1289, although these appellants are named in the judgment as judgment debtors (See R. 62). This leaves us to speculate whether the trial court actually intended to hold these appellants liable. If he did intend to hold them liable, we must speculate as to what particular activities of these defendants created that liability.

2. *Finding of Fact No. VI — The Adoption of findings made by the National Labor Relations Board*

Finding of Fact No. VI deals with the issue of liability. It provides in part:

"That after said picket lines had been established, the defendants through their respective representatives, usually operating in pairs, contacted plaintiff's subcontractors and their employees, in-

structing them not to load trucks or otherwise render any services for or on behalf of plaintiff and uttering or implying threats of reprisals to said employees if they should do so; . . . ''

None of the defendant unions, or any of their agents, are named or described; none of the subcontractors are named or described; none of the ''instructions'' or ''threats'' reportedly given are set forth; and there is no suggestion of time or place. Such a finding makes it impossible to determine what evidence the trial court considered, or what witnesses it believed on this key issue.[12] More important, without explicit findings of ultimate facts, it is impossible to determine the legal theory or theories of liability which the trial court applied in reaching his decision for the appellee.

In the remaining portion of Finding No. VI, the trial court adopted, by reference, certain findings of fact made by the National Labor Relations Board in an unfair labor practice proceeding brought against the appellants.[13] We submit that this adoption, by reference, was highly improper. While the attorneys did argue the significance of the Board's findings before the trial court, the findings were never offered or admitted into evidence.

The National Labor Relations Board proceedings

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[12] As an example, the trial court allowed evidence to be taken that certain *unidentified* union representatives had threatened the employees of Soule Steel Company and Acme Iron Works (See, *supra*, pp. 26-28). If these are the incidents described in Finding No. VI, the finding is clearly erroneous, as no rule of law permits the appellants to be held responsible for the conduct of unidentified persons. Under the present finding, however, we do not know what incidents, or what evidence, the trial court had in mind.

[13] See *Seattle District Council of Carpenters*, 114 NLRB 27 (1955).

were brought against appellant union under Section 8(b)(4) of the Labor Management Relations Act. The instant action was commenced and litigated under Section 303(a) of that Act. While the substantive provisions of these sections are the same, they contemplate separate and distinct proceedings. As the Supreme Court held in *International Longshoremen and Warehousemen's Union v. Juneau Spruce Corporation,* 342 U.S. 237, at pp. 243-244, 96 L.Ed. 275 (1952):

> "Section 8(b)(4)(D) and Section 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; Section 303(a)(4) to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of Section 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed."

A finding made by the Board in proceedings under Section 8(b)(4), on evidence before the Board, may be different from, or even contrary to, a finding made by a court or jury in a damage action under Section 303, even though the conduct involved in both proceedings is essentially the same. See *United Brick and Clay Workers v. Deena Art Ware, Inc.,* 198 F.2d 637 (6th Cir. 1952), cert. denied, 344 U.S. 897, where the Court of Appeals for the Sixth Circuit affirmed a jury verdict against a union, under Section 303, *even though* the National Labor Relations Board had found, in unfair labor practice proceedings, that the union's con-

duct did not violate Section 8(b)(4), and *even though* the same circuit had sustained the Board's ruling. See *NLRB v. Deena Art Ware,* 198 F.2d 645 (6th Cir. 1952). The court explained that the two proceedings were separate and distinct, that the evidence produced in both cases was not the same, and that each fact-finding agency was to make its own determination on the evidence before it. For these reasons, the court rejected the union's attempt to have the Board's findings adopted as conclusive in the damage action.

The findings of the NLRB, under Section 8(b)(4) are, therefore, nothing more than "hearsay" as far as a damage action under Section 303 is concerned. In the absence of legislation to the contrary, it would be error to admit such findings in evidence. *Buckeye Powder Co. v. E. I. DuPont De Nemour Powder Co.,* 248 U.S. 55, 63 L.Ed. 123 (1918); *Proper v. John Bene & Sons,* 295 Fed. 729 (D.C. N.Y. 1923).

Under the federal anti-trust statutes, it is possible for a decree in a government anti-trust proceeding to be introduced as evidence in a subsequent suit for damages, arising out of the same conduct. Section 5 of the Clayton Act specifically provides:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against defendant in any suit or proceeding brought by any other party . . . " 15 U.S.C. Section 16.

Thus, findings of fact made in a government anti-

trust proceeding are admissible in evidence in a subsequent damage action. *Sablosky v. Paramount Film Distributing Co.,* 137 F.Supp. 929 (D.C. Penn. 1955). See also *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558, 95 L.Ed. 534 (1951).

No legislation has ever been adopted by Congress, however, to make findings of the National Labor Relations Board, adopted in an unfair labor practice proceeding under Section 8(b)(4) of the Labor Management Relations Act, admissible in evidence in a subsequent damage action under Section 303 of the Act.

Appellants submit, therefore, that the trial court had the duty of making independent findings of fact on the evidence in the record before him, and that it was improper for him to consider and adopt the findings made by the National Labor Relations Board based upon other evidence in another and separate proceeding.

3. *Finding of Fact No. VII*

Finding of Fact No. VII deals with the "object" of the union's conduct. The finding is stated in the words of the controlling statute and is, therefore, more properly classified as a "conclusion of law" than a "finding of fact." No suggestion is made as to what fact or facts convinced the trial court that an "object" of the unions' conduct was to force the subcontractors to cease doing business with the appellee.

Determining the "object" of a union's conduct is a most difficult issue in a secondary boycott case. The courts have not permitted the National Labor Relations Board to adopt any mechanical tests in finding an

is difficult for appellants to point out to this Court in what ways the findings are clearly erroneous, because we have no idea of what witnesses the trial court believed, or of what evidence it considered in reaching those findings. We are in the dark as to the trial court's theory of liability and its theory of damages.

We urge, therefore, that this case be remanded to the trial court with instructions to prepare definite and forthright findings of fact on the material issues.

II.

THE TRIAL COURT COMMITTED ERROR IN THE ADMISSION OF EVIDENCE AND IN REFUSING TO STRIKE CERTAIN ADMITTED EVIDENCE

(Specification of Error No. 4)

During the trial the trial court improperly admitted incompetent and irrelevant evidence. As we have pointed out in the preceding section of this brief we do not know whether the trial court considered this evidence in reaching its decision as the findings of fact entered do not reveal the "factual basis" for that decision.

We believe the trial court erred in admitting evidence and in refusing to strike evidence in the following respects:

A. Evidence of the Activities of a Representative of the Teamsters Union Local 910 Was Irrelevant and Should Have Been Stricken. (Specification of Error 4(1))

The trial court admitted evidence that in November of 1954 a business agent of Teamsters Union Local 910 of Kent, Washington, instructed an employee of the Western Sand and Gravel Company not to go on the Cisco job (R. 247-248), and suggested to the owner of

the Western Company that Western not perform for Cisco (R. 250-252).

Appellants objected that this evidence was inadmissible because Teamsters Union Local 910 was not a defendant in the case (R. 247, 249-252). The trial court admitted the evidence, ruling that if it did not appear at the end of the trial that there was any connection or any agency relationship between the representative of Local 910 and the defendants in the case, he would disregard the evidence. He indicated a motion to strike would be taken under consideration later in the case (R. 245, 251, 253). At the end of the trial, the appellants renewed the motion to strike (R. 557) but the court made no ruling on the motion.

Nowhere in the entire record was a connection established between the activities of a representative of Teamsters Union Local 910 and any of the appellants. It was not established, or even suggested, that the activities of this representative were encouraged, assisted, condoned, approved or ratified by any of the appellants, or even that they were conducted within the knowledge of the appellants.

Appellants submit that it was error for the trial court to refuse to strike the evidence in question.

B. Evidence of the Activities of Unidentified Union Representatives on the Premises of the Acme Iron Works and Soule Steel Company Was Irrelevant and Should Have Been Stricken. (Specification of Errors Nos. 4(2) and 4(3))

The trial court admitted testimony that unidentified union representatives had made appeals and threats to

the employees of the Acme Iron Works (R. 257-261) and to the owner of the Soule Steel Company (R. 263).

At the end of the trial the appellant moved to strike this testimony (R. 557) but the trial court made no ruling on the motion.

It is not necessary to cite authority for the fundamental proposition that appellants cannot be held responsible for the activities of unidentified persons. There is no indication or even suggestion in the entire record that the activities of these persons, whoever they were, was encouraged, assisted, condoned, approved or ratified by any of the appellants or that the appellants even knew of such activities.

Appellants submit it was error for the trial court to refuse to strike such testimony.

C. Plaintiff's Exhibits 38, 40 and 41 Were Not Properly Authenticated and Should Not Have Been Admitted. (Specification of Error No. 4(4))

On the issue of damages plaintiff offered in evidence certain financial documents. Three exhibits were offered at one time—plaintiff's Exhibits 38, 40 and 41 (R. 348-349).

It is the position of the appellants that there is no evidence in the entire record to indicate that appellee suffered *any damages* whatever, as as result of any unlawful "secondary" activities of the appellants (see part III of this argument). Evidence of the appellee bearing on the amount of damages is, in appellants' view, irrelevant and immaterial. However, in the event that this court should consider this evidence to be relevant and material, appellants urge the following rea-

sons why this evidence should not have been admitted by the trial court.

Plaintiffs Exhibit 38 consisted of two sheets of paper, one purporting to be a profit and loss statement of the Cisco Company from December 1, 1954, to December 31, 1955, and the other purporting to be a balance sheet for the Cisco Company as of December 31, 1955 (Pl. Ex. 38, R. 345).

Cisco's accountant, Mr. Harry Skelton, developed these papers from Cisco's books and records and from the books and records of the bonding company including the "bonding company report" which was plaintiff's Exhibit 40 (R. 346-348). Skelton relied on Exhibit 40. He did not go behind it (R. 347, 349-350).

Plaintiff's Exhibit 40 was a bound sheaf of papers purporting to be a complete record of receipts and disbursements involving the bonding company and Cisco for the period January, 1955, to December, 1955 (Pl. Ex. 40, R. 169). At the time the bonding company assumed control of the Cisco operation, Cisco had eight separate construction projects underway. Exhibit 40 involves receipts received by the bonding company and disbursements made by it on all eight projects (R. 175-176). The document consists largely of a listing of checks drawn by the bonding company with a rough breakdown as to the various Cisco projects concerned (R. 170). It does not reflect what the checks were drawn for (R. 170, 174, 175). Some supporting information was in the bonding company files but it was not made a part of Exhibit 40 (R. 171-174). Other supporting information such as invoices and bills were in Cisco's possession (R. 175).

Exhibit 40 was explained by Mr. Albert O. Prince, an attorney employed by the bonding company (R. 167). Mr. Prince is not an accountant (R. 177). Exhibit 40 was not prepared by Mr. Prince. It was prepared by a Mr. George Douglas, a consulting engineer and bookkeeper. Mr. Douglas is not a regular employee of the bonding company but works on a fee basis (R. 177). Mr. Douglas did not testify.

Prince indicated that Exhibit 40 was prepared under his supervision and direction and that the exhibit is part of the office records of the bonding company and that it was kept by the bonding company in the regular course of business. He explained that recapitulations of receipts and disbursements were necessary in the business (R. 177).

Plaintiff's Exhibit 41 is a one-page sheet purporting to be a job cost summary of the Young's Lake and Redmond projects (R. 349). This sheet was prepared by Cisco's accountant, Mr. Harry Skelton, from the records of the Cisco Company and from the records of the bonding company (R. 349) including the report of the bonding company which is Exhibit 40 (R. 384). Insofar as Skelton relied on Exhibit 40, he did not go behind it (R. 345, 349-350). Some of the figures on the sheet were taken by Skelton from a list or work sheet prepared by "someone else" whom Skelton could not name (R. 393).

None of the basic records of the bonding company were offered or admitted into evidence.[16]

Exhibits 38, 40 and 41 were offered in evidence at

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[16] The basic records of the Cisco Company itself were not offered or introduced into evidence but they were made available to counsel for the appellants prior to the trial (R. 177).

the same time (R. 348-349). Appellants objected to the admission of all three exhibits (R. 350-353). Appellants urged that the foundation exhibit, Exhibit 40, was inadmissible on the ground of competency; that its authenticity hadn't been established, that it was prepared by someone other than the witness who explained it, that the person who made the record was not called to testify and, in addition, that it was not the best evidence and that it was generally irrelevant as it was merely a listing of the checks drawn by the bonding company and there was no indication as to what these checks were for (R. 357-352).

Appellants objected to Exhibits 38 and 41 because they were based in large part upon Exhibit 40, and, as a result, the same objections that applied to Exhibit 40 would apply to these exhibits (R. 351).

The appellee argued that the "shop book rule" made Exhibit 40 admissible (R. 351-352). The trial court then ruled:

> "I have a little doubt about it, I must say, to be frank about it, but there is a pretty broad allowance made on this shop book rule. I am going to admit it now and allow you an exception. I have some doubt about it. Go ahead." (R. 352-353)

Some doubt exists in the record as to whether the court then admitted all three exhibits. The printed record suggests that only Exhibit 41 was admitted.[17]

However, Exhibits 38 and 40 have tags attached to them suggesting that they were admitted.

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[17]Immediately following the court's ruling this notation appears "(Thereupon plaintiff's Exhibit No. 41 for identification was received into evidence)" (R. 353). See also pages iv and 610 in the original "Transcript of Proceedings."

In any event, appellants submit that all three exhibits were inadmissible. By itself the foundation exhibit (Exhibit 40) is hearsay as it was prepared by a person, Mr. George Douglas, who was not called to testify. It was presented, however, by Mr. Albert Prince, an attorney for the bonding company who testified that the record was taken from the files of the bonding company. The mere fact that papers and documents are taken from business files does not establish authenticity under the shop book rule. *Schmeller v. United States* 143 F.2d 544, 550 (6th Cir. 1944. In order to be admissible a document must comply with all of the requirements of the federal shop book statute:

> "Record made in regular course of business: photographic copies
>
> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business' as used in this section in-

> cludes * * * business, profession, occupation and calling of every kind * * *." 28 U.S.C. Sec. 1732

This statute does not contemplate the admission of all records possessed by a company in the course of its business but only those records such as "payrolls, accounts receivable, accounts payable, bills of lading and the like," which have a special "trustworthiness" about them, as they are prepared regularly and consistently by employees having a duty to make such records. *Palmer v. Hoffman,* 318 U.S. 109, 87 L.Ed. 645.

As one court pointed out:

> "The Federal Shop Book rule is limited to routine, clerical entries made contemporaneously with the event by a person charged with the duty of maintaining the records. They do not extend to matters of opinion and similar matters." *Schering Co. v. Marzall,* 101 F.Supp. 571, 573 (D.C. D.C. 1951).

In the instant case the document submitted was not a business record like a payroll, an account receivable or an account payable, but it was a "compilation" of information in bonding company files purporting to show all receipts received by the bonding company and all disbursements made by it on the Cisco projects. The foundation documents supporting the receipts and disbursements are not a part of the compilation nor were they introduced into evidence.

Although the "compilation" purports to be a document which *was kept* by the bonding company in the regular course of business, there is no testimony that it *was prepared* by any employees of the bonding company having *the duty* of regularly preparing such a

sake of argument, that there were incidents which created liability for the appellants, there is no showing whatever that appellee sustained any measurable damages as a result of those incidents. There is a complete failure of proof on the issue of damages.

This argument encompasses all the major specifications of error.

A. In Order to Recover a Judgment under Section 303 of the Labor Management Relations Act, Appellee Must Show That It Has Suffered Actual Damages as a Direct and Proximate Result of Appellants' "Secondary Boycott" Activities.

The instant action was brought and litigated by the appellee under the provisions of Section 303 of the Labor Management Relations Action of 1947, which provides, in relevant parts, as follows:

> "Sec. 303(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> "(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;
>
> * * * * * * * *
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of

> the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

The conduct made unlawful under Section 303(a)(1) is also made an "unfair labor practice" under Section 8(b)(4)(A) of the Act. See App. A, *infra,* pp. 79-80. The language in the two sections is substantially identical. Section 8(b)(4) subjects an offending labor organization to unfair labor practice proceedngs by the National Labor Relations Board while Section 303, on the other hand, subjects an offending labor organization to a civil suit for damages in the federal district courts.

1. *The Distinction Between Lawful "Primary" Activity and Unlawful "Secondary" Activity.*

Read literally, Sections 8(b)(4)(A) and 303(a)(1) would seem to outlaw all strikes and all picketing. Section 8(b)(4)(A) provides:

> "It shall be an unfair labor practice for a labor organization . . . to engage in . . . a strike . . . where an object thereof is . . . forcing . . . any employer or other person . . . to cease doing business with any other person."

Every strike and almost every form of picketing has as *an* object the forcing of some employer or person to cease doing business with another person. Indeed, the ability to bring economic pressure to bear on an employer with whom a union has a dispute is the very heart of the labor movement.

demand that the appellee pay these fringe benefits (R. 448). The president of the appellee rejected this demand arguing that he could not afford to pay the benefits requested, and telling the union representative, "You can take your men off the job if you want to. I would like to have you leave them. If they stay, they will have to work under my conditions" (R. 450).

Thereupon the Seattle District Council of Carpenters called a strike of the carpenters employed by the appellee and caused the appellee's construction sites to be picketed.[21] The pickets carried signs clearly identifying the appellee as the employer being picketed:

> "Cisco Construction Company unfair to wages and working conditions—District Council of Carpenters A.F.L." (R. 13)

The trial court concluded that this job site picketing was not unlawful (App. B, *infra,* p. 88). This ruling is supported by abundant authority.

Where a union pickets the premises of an employer, in a dispute with that employer, the picketing does not constitute a "secondary boycott" even though employees of neutral employers are thereby induced not to cross the picket line. This conduct is classified as traditional primary activity. The fact that it may cause harm to the neutral employer is regarded as incidental. *N.L.R.B. v. International Rice Milling,* 341 U.S. 665 (1951). As the N.L.R.B. stated in its brief to the Supreme Court in the *International Rice* case, *supra*:

> "At the least, in the conventional case, the compromise which Congress effected allows for union

[21] It is stipulated that this picketing was created and maintained on behalf of appellant Carpenters Union Local 131 and appellant Carpenters Union Local 1289 (R. 14).

> efforts to curtail the primary employers' business by picketing at the premises of the primary employer to induce the employees of any neutral who approaches the premises not to enter therein. By primary picketing and allied appeals, the union may induce employees of neutral employers to refrain from assisting the primary employer by rendering services to him at his place of business. When confined to stoppage of business at the primary employer's premises, the thrust of the pressure is clearly against the primary employer, and is an integral part of the primary strike. The effect upon the neutral employer's business of the withholding of labor by his employees at the primary employer's premises in these circumstances is entirely incidental to the primary picketing, and is therefore not to be regarded as an attempt to exert secondary pressure upon the neutral employer."

Even in situations where the premises of the employer are shared by him with other employers, a union's picketing of those premises is regarded as lawful primary activity, as long as the union clearly identifies the employer that is being picketed. The leading case is *Ryan Construction Company,* 85 NLRB 417 (1949). In this case the Bucyrus Company decided to build an addition to their plant and they engaged the Ryan Construction Company to do the work. While the construction work was in progress the Electrical Workers Union called a strike against Bucyrus and picketed the Bucyrus premises, including the entrance which was used exclusively by the Ryan employees. The pickets carried signs identifying Bucyrus as the employer being picketed. When Ryan employees refused to cross the picket line, Ryan filed unfair labor practice charges with the

National Labor Relations Board, charging that the union was engaging in a "secondary boycott" under Section 8(b)(4)(A) of the Act. The Board found no merit in these charges. The Board held:

> " . . . Section 8(b)(4)(A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 employees wish to enter the premises." 85 NLRB 417, 418.

The *Ryan* decision is still regarded as a correct expression of the law. *Retail Fruit and Vegetable Clerks Union, Local 1017, v. N.L.R.B.,* ..... F.2d ..... (9th Cir. 1957).

See also:

Pure Oil Company, 84 NLRB 315;[22]

Sailors Union of the Pacific, 92 NLRB 547;

DiGiorgio Fruit Corp. v. N.L.R.B., 191 F.2d 642 (D.C. Cir. 1951), cert. denied, 342 U.S. 869;

N.L.R.B. v. General Drivers, Local 968, 225

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[22] The *Ryan Construction* and *Pure Oil* decisions were cited with approval by the Supreme Court in *International Rice Milling Co. v. NLRB,* 341 U.S. at 672, n. 6.

F.2d 205 (5th Cir. 1955), cert. denied, 350 U.S. 914.

Under the trial court's holding and under the facts and the law, the job site picket lines established and maintained by appellant Seattle District Council of Carpenters constituted "primary" and not "secondary" activity, and cannot form the basis of a judgment for damages under Section 303. Although the job site picket lines may have caused the subcontractors not to perform resulting in added expenses for the appellee, this was the effect of lawful activity and is *damnum absque injuria.* As the Second Circuit stated in *N.L.R.B. v. Service Trade Chauffeurs Local 145,* 191 F.2d 65 (2nd Cir. 1951):

> "... a union may lawfully inflict harm on a neutral employer without violating Section 8(b)(4) so long as the harm is merely incidental to a traditionally lawful primary strike conducted at the place where the primary employer does business."

If the judgment in the instant case is to be sustained, it must be on the theory that other activities of the appellants created liability and caused damage to the appellee.

3. *Appellants' Unlawful Secondary Activities, if any, Did Not Result in Damage to the Appellee.*

After the job site picket lines were established several subcontractors refused to deliver materials to the job sites. In some cases, the subcontractors themselves chose not to send their men through the picket lines, and in other cases, when the subcontractor's employees were sent to the job sites, they would refuse to cross the

picket lines (see *supra,* pp. 9-11). Subsequently the appellee made arrangements with several of the subcontractors to pick up the promised materials at the premises of these subcontractors, using its own trucks and employees.

When Cisco trucks arrived at the premises of these subcontractors to pick up materials, several incidents occurred involving the appellant unions and the employees of the subcontractors. If the instant judgment is to be sustained it must be on the theory that the conduct of the appellant unions, on these occasions, constituted unlawful secondary activity and caused damages of $75,000 to the appellee. As we shall see, even if we assume that the conduct was unlawful, there is not a scintilla of evidence that such conduct caused any damage to the appellee.

a. ***Appeals and Threats Directed to the Subcontractors***

There was evidence that on one or two occasions agents of some of the appellant unions made appeals and threats to subcontractors regarding their agreements to furnish the appellee with materials (R. 228-229, 300-301). Under no circumstances could this conduct be found to be unlawful under Section 303(a) for the statute only proscribes inducements directed to *employees.* Appeals and threats to employers are not unlawful under this section.

Rabouin v. N.L.R.B., 195 F.2d 906, 911 (2nd Cir. 1952);

Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950), cert. denied, 340 U.S. 885;

Studio Carpenters Local 946 v. Loew's, Inc., 182 F.2d 168 (9th Cir. 1950), cert. denied, 340 U.S. 828.

It is also to be noted that no damage flowed from these appeals and threats. The subcontractors uniformly remained steadfast in their determination to continue furnishing the appellee with materials, and they did so.[23]

b. ***Incidents at the Cadman Sand and Gravel Company***

It was stipulated below that on November 5, 1954, and on several subsequent occasions, the appellant Seattle District Council of Carpenters caused a "roving picket line" to appear at the premises of the Cadman Sand and Gravel Company whenever the appellee's trucks would arrive to be loaded with concrete (R. 13).

The pickets carried signs identifying Cisco as the employer being picketed (R. 200). On November 5, when Cisco trucks arrived for a load of concrete, followed by the pickets, the Cadman employee in charge of the loading didn't know what to do. He left his job and called his union representative and then he talked to his employer (R. 157-158, 163). He was told by his employer that he was to continue loading Cisco trucks and he then returned to his job and loaded the trucks

[23] As an example, the president of the Layrite Company, Vern Frese, testified that he received a call from an agent of the appellant Operating Engineers Union Local 302. This agent asked if Layrite was going to continue to furnish Cisco with concrete blocks. Frese replied that he was. The union representative then threatened to put a picket line around his plant. Frese did not change his position, and told him he would not submit to such a request. (R. 228-229, 239). Layrite continued to furnish the appellee with concrete blocks (R. 236). The union never took any action against Layrite or its employees. (R. 239).

that were waiting (R. 158, 162-163, 201). The delay involved was approximately an hour or an hour and a half (R. 102, 133, 165).

The trial court concluded that the roving picket line at the Cadman plant was not unlawful except insofar as it was carried on at the Cadman premises when no Cisco trucks were present. (See Conclusion of Law No. IV, App. B, *infra,* p. 88). This ruling is supported by the following authorities:

Schultz Refrigerated Service, 87 NLRB 502;

Sailors Union of the Pacific (Moore Drydock Co.) 92 NLRB 547;

NLRB v. Service Trade Chauffeurs Local 145, 191 F.2d 65 (2nd Cir. 1951);

Alpert v. Steel Workers, 141 F.Supp. 447 (D.C. Mass. 1956).[24]

The delay in loading Cisco trucks on November 5, 1954, is, therefore, the result of lawful activities and cannot form the basis for an award of damages under the statute.[25]

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[24] Recently the board has modified the rule announced in the *Schultz* case and announced that roving picketing is unlawful whenever the union could accomplish effective picketing at the employer's main premises. *Washington Coca-Cola Bottling Works,* 107 NLRB 299. The courts have rejected this theory. See *Teamsters Local 859 v. NLRB,* 229 F. (2d) 514 (D.C. Cir. 1955).

[25] Mr. Schiel, president of Cisco, testified, on *cross-examination* that the delay in loading Cisco trucks on November 5, necessitated the expenditure of "thousands of dollars" because, assertedly, the delay in loading caused a delay in pouring which prevented a concrete foundation from setting properly, which later gave way under hydrostatic pressure, and had to be repaired (R. 144-145). This testimony was not developed on direct examination or upon re-direct examination. It was not corroborated by any other witness, even by appellee's accountant who testified at length concerning additional expenses incurred by appellee on the two construction projects. Appellants submit that the testimony

On November 5, 1954, an agent of appellant Teamsters Union Local 174 urged an employee of Cadman's not to load Cisco trucks and made threats to him (R. 201). On November 8, 1954, an agent of appellant Operating Engineers Union Local 302 urged three employees to leave their jobs the next time the roving picket line appeared (R. 187, 192, 195). On November 11, 1954, an agent of appellant Teamsters Union Local 174 threatened a group of Cadman employees with being "run up on the carpet" if they didn't cooperate in helping to break Cisco (R. 105).[26]

Assuming for sake of argument that these appeals and threats could be found to be unlawful "secondary" activities, it is undisputed they had no effect on the work performance of the Cadman employees. The employees ignored all appeals and continued to load the appellee's trucks with concrete. As one employee, Roland Pearson, testified:

> "I never paid no attention to (the picketing) ... I performed my normal duties the first day the pickets showed up. There was no day when the pickets were there that I didn't perform my normal duties. There was no day when the pickets were there that I observed any other of the employees

[26] There is a direct conflict in the testimony as to whether such threats were actually made. (See, *supra*, pp. 16-17). The trial court never indicated which witnesses it believed. We are assuming here that it believed the appellee's witnesses.

is unworthy of belief. Even if the appellants were legally responsible for the delay, the bare assertion that Cisco lost "thousands of dollars" is highly speculative and could not properly form the basis for an award of damages. "Actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferrable." *Central Coal and Coke Company v. Hartman*, 111 Fed. 96 (8th Cir. 1901) and numerous other cases and authorities.

who did not perform their normal duties." (R. 195-196)

Or, as another employee, Leonard Downs, put it:

> " . . . the men were in favor of sticking with the company and continuing to work. They did continue to work. There was no work stoppage at the Cadman plant." (R. 190)

Cadman employees continued to load Cisco trucks until the completion of the construction projects (R. 201). Cisco got all the concrete it wanted (R. 206).

Appellants submit, therefore, that any "unlawful" activities of appellants involving the Cadman employees had no effect on the loading of Cisco trucks. There is no evidence to indicate that Cisco was damaged in any way by these activities.

c. *Incidents at the Western Sand and Gravel Company*

There is evidence that on or about November 15, 1954, the appellant Seattle District Council of Carpenters caused a picket to appear at the premises of the Western Sand and Gravel Company (R. 14, 303, 309). There is some question as to whether Cisco trucks were present at the time.[27] This picket was observed by a Western employee when he left the premises to go to lunch. When he returned the picket was gone (R. 248).

Assuming that no Cisco trucks were present, and assuming, therefore, that the picketing may have been an unlawful "secondary activity," this activity had no effect on the work performance of the Western employees.

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[27] Mr. Smith, president of the Western Company, testified there were no trucks present (R. 310). However, the Pre-Trial Order contained a stipulation of fact to the effect that Cisco trucks were present (R. 14).

As one of the Western employees, Lawrence Ward, testified:

> "There was no work stoppage during the time that this picket was present. . . . None of the employees refused to perform their normal work as a result of the picket being there. I don't know of any other effect this picket had on the work that was performed by the employees." (R. 249-250)

This testimony was corroborated by the president of the Western Company. He testified:

> "Q. Did the picketing have any effect upon the normal performance of the duties of your employees?
>
> A. No, they never." (R. 253)

Western continued to perform for Cisco (R. 303, 309). There is no evidence whatever to indicate that Cisco was damaged in any way by the appearance of the picket at the Western Company.

d. *Incidents at the Layrite Company*

There is evidence that on November 29, 1954, and on two subsequent occasions, an agent of appellant Laborers Union, Local 440, Mr. Lucero, appealed to three employees of the Layrite Company, asking them not to load Cisco trucks with concrete blocks, and threatening them with disciplinary proceedings if they refused (R. 214-217, 222-223).[28] Assuming for sake of argu-

[28] Lucero's threats were in violation of the policy of the Laborers Union. When James Sauro, Lucero's superior in the union, heard about Lucero's statements, he sent Lucero back to Layrite to make a retraction (R. 481). Lucero then met with the Layrite employees and explained that the Laborers had no objection to the employees loading Cisco trucks and that they were to load any trucks that came in (R. 219-220).

ment that these appeals and threats constituted unlawful "secondary" activity, they had no effect on the work of the Layrite employees. The employees continued to load Cisco trucks when they appeared. One of the Layrite employees, Mr. James Thurman, testified:

> "Q. And Mr. Thurman, did you continue to load the trucks?
>
> A. Yes, sir.
>
> Q. And at all times?
>
> A. Yes, sir.
>
> Q. Was there any, from the time Mr. Lucero talked to you about 5 o'clock on the evening of November 29, 1954, was there any delay in the loading of Cisco trucks?
>
> A. Not that I know of, sir." (R. 218)

This testimony was corroborated by that of Mr. Frese, president of Layrite:

> "Q. And was there any work stoppage as far as loading of those trucks is concerned?
>
> A. Not to my knowledge.
>
> Q. Well, Mr. Frese, if there had been any delay in loading of the Cisco trucks would you have known about it?
>
> A. I am sure that I would have. Now, it depends on what you mean by 'delay.' Some times a driver will come in with a truck and go up to the office for a ticket, and the truck may sit there for a few minutes while he is getting his invoice and orders straight, but I would say there was no delay other than the normal loading operation."

The Layrite Company continued to furnish concrete blocks to Cisco (R. 236).

There is not a scintilla of evidence to indicate that Cisco was damaged in any way by the activities of appellant Laborers Union Local 440 involving the Layrite employees.

B. Summary—Appellee Has Failed to Establish Any Substantial Evidence of Actual Damages Flowing From and Caused by Appellants' "Secondary" Activities.

In unfair labor practice proceedings under Section 8(b)(4) of the Act, the National Labor Relations Board is not concerned with whether the employees of neutral employers are actually induced, by a union's conduct, to cease work. It is the "inducement" itself that is unlawful. The Board is not concerned with whether the "inducement" is effective. *N.L.R.B. v. Denver Building and Construction Trades Council,* 193 F.2d 421, 424 (10th Cir. 1952); *Union Chevrolet Company,* 96 NLRB 957.

To justify a recovery in a damage action under Section 303, however, it is crucial that the plaintiff show that the unlawful inducement *was effective* and that a work stoppage took place. Section 303 was designed only to compensate an employer for the actual losses sustained by him as a direct result of a union's "secondary activities." As Senator Taft explained, "In this (section) we simply provide for the amount of the actual damages." 93 Cong. Rec. 5074. The section was designed to "restore to people who lose something, because of boycotts and jurisdictional strikes, the money which they have lost." 93 Cong. Rec. 5060.

Thus, a plaintiff, under Section 303 must not only show that there has been an unlawful boycott, he must

go further and establish with competent evidence that the boycott was effective and that he has been damaged.

The plaintiff here is in a similar position to one bringing a treble damage action under the anti-trust laws. To justify recovery, there must be a showing of actual damages:

> "It must be conceded that plaintiff cannot maintain an action under the provisions of (the Sherman Act) unless it has suffered an injury to its business or property by reason of the violation by the defendants of some of the prohibitions contained in that Act (citing cases). It must show that it was injured (citing cases) and the mere fact that the defendants have been adjudged guilty in the Toledo case (brought by the government) is of no avail to plaintiff unless it establishes that it sustained pecuniary damage (citing cases). The plaintiff must show personal, pecuniary damages (citing cases) which must be proved by facts which their existence is logically and legally inferrable (citing cases). Without actual damages to plaintiff, there can be no recovery (citing cases)." *Turner Glass Corporation v. Hartford Empire Corporation,* 173 F.2d 49 at pages 51-52 (7th Cir. 1949).

See also:

> *Maltz v. Sacks,* 134 F.2d 2 (7th Cir.);
>
> *Johnson v. American Federation of Musicians,* ..... F.2d ..... (D.C. Cir. Aug. 14, 1957).

In the instant case there is no showing of actual damages. There is no substantial evidence whatever that any employees of the subcontractors actually stopped working as a result of the alleged "secondary" activities of the appellant unions, or that the appellee was injured in any way by such activities.

Appellants submit, therefore, that it was error for the trial court to enter judgment for the appellee in the instant case. Appellants prays that this Court enter an order reversing the judgment below and dismissing appellee's cause of action.

CONCLUSION

For the reasons stated in Part I of the Argument herein, appellants pray that this Court remand this case to the trial court for the entry of specific and forthright findings of fact on the material issues.

In the alternative, and for the reasons stated in Part III of the Argument herein, appellants pray that this Court reverse the judgment below and instruct the trial court to dismiss the action.

Respectfully submitted,

On behalf of the Appellants Carpenters Union, Local 131; Carpenters Union, Local 1289; Seattle District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Teamsters, Chauffeurs and Helpers, Local Union 174 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO:

SAMUEL B. BASSETT
BASSETT, DAVIES & ROBERTS, Attorneys at Law
811 New World Life Bldg., Seattle 4, Washington

On behalf of the Appellant Union of Operating Engineers, Local 302, AFL-CIO:

L. PRESLEY GILL, Attorney at Law
2800 First Avenue, Seattle 1, Washington

On behalf of the Appellant International Hod Carriers, Building and Common Laborers' Union of America, Local 440, AFL-CIO:

ROY E. JACKSON, Attorney at Law
1207 American Building, Seattle 4, Washington

APPENDIX A

STATUTE INVOLVED

Pertinent sections of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-187, are as follows:

Definitions

"Sec. 2. When used in this Act—

* * *

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * *

Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * *

Unfair Labor Practices

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to

use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

"(A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * *

Suits By and Against Labor Organizations

* * *

"Sec. 301 (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly au-

thorized officers or agents are engaged in representing or acting for employee members.

* * *

"(c) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * *

Boycotts and Other Unlawful Combinations

"Sec. 303 (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

* * *

APPENDIX B

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

CISCO CONSTRUCTION CO., an Oregon corporation, *Plaintiff*,

vs.

CARPENTERS UNION, LOCAL 131; CARPENTERS UNION, LOCAL 1289; SEATTLE DISTRICT COUNCIL OF CARPENTERS, AFFILIATED WITH THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO; TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION 174, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302, AFL-CIO; and LOCAL 440, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, AFL-CIO, *Defendants.*

Civil No. 3822

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Court without a jury commencing on the 9th day of July, 1956, plaintiff appearing by McDannell Brown and Hugo Metzler, Jr., its attorneys, and the defendants appearing by their respective counsel, Samuel B. Bassett, J. Duane Vance, Roy E. Jackson, and L. Presley Gill, said trial continuing before the Court from day to day to and including July 24th, 1956.

Whereupon, the Court, having heard the evidence adduced and the arguments of counsel and considered

the briefs filed herein on behalf of the respective parties, and having rendered its Memorandum Decision and having considered the Findings of Fact and Conclusions of Law tendered by plaintiff and objections thereto interposed by defendants, makes the following

Findings of Fact

I.

The plaintiff was and is an Oregon corporation with its principal place of business in Portland, Oregon, and was, at the time of the transactions hereinafter mentioned, engaged in the general construction business in the States of Oregon, Washington and Idaho; that it was performing contracts in said States for the United States Army, for the Atomic Energy Commission and others; that a substantial amount of the materials used in said construction work, and particularly used by plaintiff and its subcontractors in performance of its contracts with the United States Army at Redmond and Young's Lake in the State of Washington, were shipped to said job sites from points located out of said State.

II.

Seattle District Council of Carpenters, affiliated with United Brotherhood of Carpenters and Joiners of America, Teamsters, Chauffeurs and Helpers, Local Union No. 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Union of Operating Engineers, Local 302, and Local 440, International Hod Carriers, Building and Common Laborers' Union of America, are labor organizations affiliated with American Federation of Labor—Congress of Industrial Organization.

III.

That none of the defendants had a contract with or was recognized by the plaintiff as the bargaining rep-

resentative of any of its employees, and none of the defendants was certified by the National Labor Relations Board as the "bargaining representative" of any of plaintiff's employees.

IV.

That no controversy, dispute or disagreement of any nature existed between any of the subcontractors of the plaintiff employed on the Redmond or Young's Lake contracts for the United States Army and any of the defendants.

V.

That on or about the 20th day of October, 1954, a representative of the defendant, District Council of Carpenters, requested plaintiff's President, Clifford T. Schiel, to pay its employees union wages including overtime pay and certain specified fringe benefits, which request was, on October 26, 1954, rejected by plaintiff's President, who refused to grant the requested wages and benefits; that as a consequence, on October 28, 1954, the defendant, District Council of Carpenters, placed pickets around plaintiff's Redmond job site, and a few days later placed similar pickets around plaintiff's Young's Lake job site; that said pickets followed plaintiff's trucks and vehicles principally to and from Cadman Sand and Gravel Plant, maintaining a roving picket line; that picketing on both jobs continued until the completion of the contracts.

VI.

That after said picket lines had been established, the defendants through their respective representatives, usually operating in pairs, contacted plaintiff's subcontractors and their employees, instructing them not to load trucks or otherwise render any services for or on behalf of plaintiff and uttering or implying threats of reprisals to said employees if they should do so; that

the conduct of defendants by their agents directed at plaintiff's subcontractors and their employees is set forth in detail in the reported National Labor Relations Board decision, Seattle District Council of Carpenters, et al., and Cisco Construction Company, 114 NLRB 27, Case No. 19-CC-72, dated September 9, 1955, which said findings in said decision and report are adopted by this Court herein and by this reference are made a part of these findings of fact; that said activities included, among others, the following:

(1) On several occasions, representatives of defendants contacted employees of Cadman Sand & Gravel Co., a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal in the course of their employment to perform any services for plaintiff as provided in said subcontract and particularly to load plaintiff's trucks, and all of said trucks of plaintiff were loaded without hindrance or delay with the exception of a delay between one-half hour and one hour on November 5, 1954;

(2) That a representative of the defendant Local 440 contacted employees of the Layrite Company, a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal to perform any services, to-wit, to load plaintiff's trucks, as required by said subcontract, nonetheless all of said trucks of plaintiff were loaded without hinderance or delay;

(3) On several occasions, representatives of defendants contacted employees of Western Sand & Gravel Company, a subcontractor of plaintiff, and induced and encouraged them to engage in a concerted refusal in the course of their employment to perform any services for plaintiff as provided in said subcontract and particularly to load plaintiff's trucks.

VII.

That the conduct of the defendants above referred to was carried on at least in part to force the plaintiff's subcontractors, as secondary employers, to cease doing business with the plaintiff by inducing and encouraging their employees to engage in a concerted refusal to work.

VIII.

That the activity engaged in by each of the defendants was part of a joint course of action participated in by all of the defendants. Said defendants were not acting as strangers to one another, but were engaged in a joint course of action to accomplish their common purpose.

IX.

That the concerted activities of the defendants herein referred to contributed substantially, directly and proximately to the non-performance of plaintiff's subcontracts by the subcontractors.

X.

That as a result of the concerted activities of the defendants and the intended consequent failure of plaintiff's subcontractors to perform their subcontracts, plaintiff was required to and did perform the work contemplated by said subcontracts; that in performing said work, the plaintiff was required to provide in whole or in part the services and materials defaulted under the subcontracts, and was put to an expense therefor of at least $75,000.00 above the subcontract cost; that plaintiff has thereby suffered damage in the sum of at least $75,000.00.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That the plaintiff's business, and particularly its performance of its contracts with the United States Army Engineers for the erection of NIKE launching sites at Redmond and Young's Lake, Washington, was an industry or activity affecting commerce as provided in Sec. 303(a) of the Labor Management Relations Act of 1947.

II.

That the defendants are each and all labor organizations within the purview of said Act.

III.

The picket lines, as initially set up by the defendant Carpenters at the job sites at Redmond and Young's Lake, were not unlawful.

IV.

The picketing of plaintiff's trucks at the premises of the Cadman Sand & Gravel Company and Western Sand & Gravel Company, standing alone and apart from other conduct of defendants, was not unlawful except insofar as it was carried on at those premises when no trucks owned or operated by the plaintiff were at such premises.

V.

That the defendants, by and through their representatives, did induce and encourage employees of several employers, subcontractors of plaintiff, in a concerted refusal in the course of their employment to perform any services on behalf of their employers for the plaintiff as required by the terms and provisions of said subcontracts; that their activities were conducted at least in part to force those secondary employers to cease doing business with the plaintiff by inducing and en-

couraging their employees to engage in a strike or a concerted refusal to work, and that such activities were in violation of Sec. 8 (b) (4) (A) of the Act and within the provisions of Sec. 303 (a) of the Act; that the failure and refusal of plaintiff's subcontractors to perform their subcontracts was the direct and proximate result of the unlawful activities of the defendants.

VI.

That plaintiff has been injured in its business and property by reason of the violations of Sec. 303 (a) by the defendants and each of them, and is entitled to recover from the defendants and each of them the damages by it sustained and its costs of this suit.

VII.

That the damage sustained by the plaintiff is not less than the sum of $75,000.00, and plaintiff is entitled to recover from the defendants and each of them the sum of $75,000.00 together with the costs of this suit.

DATED this 21st day of February, 1957.

GEORGE H. BOLDT, *Judge*

Presented by:

HUGO METZLER, JR., and

McDANNELL BROWN

By HUGO METZLER, JR.

Attorneys for Plaintiff.